90-1222

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
for the County of Los Angeles,
MILDRED WILLIAMS, *et al.*,
Respondents.

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
for the County of Los Angeles,
ANTOINETTE SECARD, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal, Second District, Div. 3

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a forum selection clause in a passenger ticket contract for an ocean voyage enforceable under federal maritime law?

LIST OF PARTIES

Petitioner is Carnival Cruise Lines Inc. There is no parent company or subsidiary (other than wholly owned subsidiaries) to be listed pursuant to Rule 29.1.

Respondents are the Superior Court of the State of California for the County of Los Angeles, and, in the *Williams* action, the following two hundred thirty-eight plaintiffs:

Mildred Williams
Amy Barta
Nancy Benton
Don Benton
Mary Benton
Rich Backman
Knesta Backman
Marjory B. Bailey
J. Lynn Baker
Duane Baker
Richard Bales
Cindi Bales
Inez Barnett
Cindy Barnett-Levy
Amy Barta
Lily Bash
Juanita Teresa Beardow
Daren Berkett
Ken D. Beto
Dayma Bold
Ella Brocksieper
Jane Buckingham
Bill Buckingham
Dave Burris
Peter Bussee
Donna Bussee
Peter and Donna Bussee
as Guardians ad Litem for
Trish Bussee, a minor;
and Steve Bussee, a minor
Vera Butler
Judd Carder
Jayne Cohen
Phillip Cohen
Robin Chow
George Chow
Robin Chow and George Chow
as Guardians ad Litem for
Christopher George Chow,
a minor; and
Jaime Rochelle Chow,
a minor
Irene Conroy
Ed Conroy
Raymond Costales
Mary Ann Costales
Alberta Crawford
June Curtis
Jim Cusak
Arion Cusak
Clifford Dalton
Donna Dalton
Clifford Dalton and
Donna Dalton as
Guardians ad Litem for
Jason A. Dalton, a minor
Joanne D'Orazi
Rick D'Orazi
Thomas D'Orazi
Theodora D'Orazi

Arlene Delehart
Kelly Der Harootunia
Michael Dillon
Kris Dillon
Patricia Dolan
Jack Eva
Janet Eva
George Fischer
Patricia Fischer
Glenn Federowich
Cindy Federowich
Teresa Felski
Frances Fishman
Gilbert Flores
Lola I. Flores
Richard Foley
Lisa Gallagher
Jim Gausch
Charlene Gausch
Philip T. George
Martha J. George
Darlene Gibson
Dianna Gilbert
David Golchehreh
Suzanne Golchehreh
David Golchehreh and Suzanne Golchehreh as Guardians ad Litem for Leila Golchehreh a minor; and Lawdan Golchehreh, a minor
Bernice Goldrup
Leon E. Grossman
Wando J. Grossman
Frankie Halford
Less Halford
James Hammerstone
Lana Hammerstone
Sigrid Hann
Marvis Haro
Barbara Heide
Lewis Heide
Georgia Herr
Vivian E. Hall
Carolyn Hongola
Mary Hurst
Barbara Jeffries
Ray Jeffries
Dale B. Johnsen
Elizabeth Johnsen
Connie Juarez
Mathew Kearney
Alice Kearney
Phyllis Keene
John Keene
Patricia A. Kendrew
Kenneth Kessler
Bessie Kessler
Julie Klenner
John H. Konte, III
Marilyn Koper
Connie Kramer
Ira Kramer
Norbert F. Kroeger
Arleen E. Kroeger
David Kuba
Jill Kuba
Tom Langusch
Rose Lantz
Tom Laster
Paul Leeder
Mary Jo Leeder
Leanne Leeder
R. L. Lehman
Lois Lehman
Linda Leveque
Jerry Lindan
Anthony Lore
Sherry Lore
Dean Mack
Vickie Mack
Jose Maldonado

Carmen Maldonado
Sadie McPhee
Clarence Mitchell
Betty Mitchell
Wallace Mitchell
Almina Mitchell
Jeffrey Moore
Essie Moore
George Munson
Margaret Munson
Thomas P. Murphy
Sharon J. Myers
Robert Myers
Arlene Myers
Ray Nicol
Christine Nicol
Peter Nitoglia
Melissa Nitoglia
Edward Odian
Diane Odian
Dale Osterbuhr
Edith Osterbuhr
Duane W. Owens
Charles Packett
Betty K. Pearce
Harold Pennington
Pauline Pennington
John Peters
Margie Peters
Cecilia Peterson
Donald Peterson
Virginia Peterson
Larry Pfost
Pat Pfost
Blanche Protz
Mel Provencio
Rachel F. Provencio
Arthur Provost
Pat Quintrell
Ed Quintrell
Alexander M. Reeves
Elizabeth Reinholdt
Peter Ressler
Vanessa Ressler
Robert Reynolds
Carole Reynolds
Vivian Risner
Joseph Saba
Annette Saba
Robert Rowe
Julie Ann Rowe
Roberta N. Rowlands
Harriet Schindele
Deanna K. Schmidt
David Schneer
Kathleen Schneer
Ann Schroeder
Charles Schroeder
Patrick M. Shea
Linda Sheehy
John Sims
Cindi Sims
Ella Smethurst
Geoffry S. Smith
Jean Smith
John Sobieski
Mildren E. Sobieski
Roderick Sparks
Teresita Sparks
Ernest H. Sprague
Lynne Spuhler
Edward Stauber
Max Steinberg
Roslyn Sternfeld
Wendy Strickler
Donna Strickler
Dean Sybrant
Eileen Sybrant
Robert Sybrant
Nadeane Thomas
Cliff Tipping
Dorothy Tipping

Leonard M. Tolvo
John Torrey
Jeanette Torrey
Dan Tyransky
Ellen Tyransky
Mary Van Barneveld
Harry Venger
Ethel Venger
Harry Vento
Rita Vento
Elizabeth Vots
Verne Pennell
Rhonda Voci
Lillian Voss
Robert E. Waterman, Jr.
Steve Watson
Shirley Watson
Natalie Weill
Irving Weill
Frankie Welcome
Les Wetherbee
Shirley Wigge
Gerda Wohlau
Fred Wohlau
Mark Wright
Eileen Wright
Dorothy Wright
Claude Wright

The six additional respondents in the *Secard* action are:

Antoinette Secard, Ed Secard, Fred Secard, George Secard, Joan K. Secard, and Diana J. Fowler.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The order of the California Supreme Court dated November 15, 1990 summarily denying Carnival Cruise Lines Inc.'s petition for review is not reported and is reproduced at page 11a of the Appendix to this Petition. The opinion of the California Court of Appeal (Second District, Division 3), dated August 21, 1990, is reported

at 222 Cal.App.3d 1548 and at 272 Cal.Rptr. 515 and reproduced at Pet. App. 1a-10a. The orders of the California Superior Court are not reported but a transcript of the court's comments is reproduced at Pet. App. 14a-16a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257 to review the decision of the California Court of Appeal since it decides the enforcement of a maritime contract [1] under federal maritime law,[2] and since the California Supreme Court summarily denied Carnival's petition for review by order dated November 15, 1990.[3]

The decision of the California Court of Appeal is "final" notwithstanding that further proceedings, including trials, are yet to come in the lower state courts, because petitioner's request for enforcement of the forum selection clause presents an issue on which later review cannot be had since "the governing state law would not permit [Carnival] again to present [its] federal claims for review." *Cox Broadcasting Corp., et al. v. Cohn*, 420 U.S. 469, 481 (1975).[4] California procedural law, which governs these cases, does not permit a party to preserve the issue of enforcement of a contractual forum selection

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[1] A passenger ticket for an ocean voyage is a maritime contract. *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1866).

[2] A state court is bound to and in this case did apply federal maritime law, and its rulings on admiralty issues are reviewable by petition for a writ of certiorari. *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239, 244-46 (1942); *Doucette v. Vincent, et al.*, 194 F.2d 834, 841-43 (1st Cir. 1952).

[3] *Madruga v. Superior Court, etc.*, 346 U.S. 556, 557 n.1 (1954), and *Bandini Petroleum Co. v. Superior Court, etc., et al.*, 284 U.S. 8, 14 (1931).

[4] *See* particularly the third category discussed in *Cox* at 420 U.S. at 481.

clause for review on appeal after trial,[5] but instead requires a party to obtain review on such an issue only on an interlocutory basis.[6] The conclusion that this issue cannot be reviewed on appeal in California's courts distinguishes this case from *Lauro Lines S.R.L. v. Chasser, et al.*, 490 U.S. 495 (1989).[7]

STATUTES INVOLVED

This case involves California Code of Civil Procedure[8] sections 410.30, 418.10 and 904.1. These materials are reprinted at Pet. App. 19a-22a.

STATEMENT OF THE CASE

This single petition[9] addresses two separate lawsuits brought in the same court of the State of California by two hundred forty-four passengers against a nonresident operator of cruise vessels. The passengers allege they

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[5] "The right of appeal [in California] is wholly statutory and no judgment or order is appealable unless expressly authorized by the [state] constitution or statute." *Hennigan v. Boren* (1966) 243 Cal.App.2d 810, 815, 52 Cal.Rptr. 748, 752 (cites omitted). Cal. Code of Civil Procedure § 904.1 is the California statute which identifies "appealable judgments and orders" from the Superior courts. Its subsection (c) expressly permits a party the right to *appeal* only "[f]rom an order *granting* a motion to . . . stay or dismiss the action . . ." (emphasis added) and does not provide the right to appeal from an order *denying* the motion. § 904.1 is reproduced at Pet. App. 21a-22a.

[6] *See* California Code of Civil Procedure § 418.10(c), reproduced at Pet. App. 20a-21a.

[7] In *Lauro Lines* this Court held that it had no jurisdiction under 28 U.S.C. § 1291 to interlocutorily review the order of a federal district court denying a cruise company's motion to dismiss the action based on a contractual forum selection clause in a ticket for passage.

[8] Hereinafter referred to as "Cal. C.C.P."

[9] Rule 12.2 permits a single petition to address cases which involve identical or closely related questions.

suffered personal injuries and other damages onboard the M/V TROPICALE during a storm at sea.

At least eighty-five of the respondent passengers who took the seven-day round-trip cruise in January, 1988 from Los Angeles to various ports in Mexico are not resident in California, but reside in seventeen other states and Canada. Pet. App. 4a-5a. Petitioner is a Panamanian corporation with its principal place of business in Miami, Florida. Pet. App. 4a. It issued ticket contracts to the respondents which included the following forum selection clause:

> It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country. Pet. App. 4a.

On September 15 and 25, 1989, petitioner, as a specially appearing defendant, moved the Superior Court to stay or dismiss the two lawsuits on the ground that the contractual forum selection clause in each respondent's ticket was valid under the applicable federal martime law. On April 12, 1990, the Superior Court denied petitioner's motions. Pet. App. 7a, 14a-16a. On May 16 and 22, 1990, Carnival petitioned the California Court of Appeal for writs of mandate directing the Superior Court to vacate its orders of April 12, 1990 in the two lawsuits, and to enter orders enforcing the contractual forum selection clause in the tickets. Carnival sought such interlocutory review under California procedural law,[10] which

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[10] *See* Cal. C.C.P. § 418.10(c), reproduced at Pet. App. 20a-21a.

See also Furda v. Superior Court, etc. (1984), 161 Cal.App.2d 418, 207 Cal.Rptr. 646, which held that "[t]he enforceability of a forum selection clause is properly raised by a motion to stay or dismiss under Code of Civil Procedure Section 410.30 * * * and entitles the moving party to the procedural benefits of Civil Procedure Sec-

expressly sets forth the procedure to obtain review of a denial of a motion to stay or dismiss the action.

On June 22, 1990, the California Court of Appeal issued alternative writs of mandate in the two cases and consolidated them for decision. After briefing by the petitioner and respondents (no appearance was made by the Superior Court), the California Court of Appeal issued its opinion on August 21, 1990, denying the petitions for writs of mandate and discharging the alternative writs. Pet. App. 1a-10a. The California Court of Appeal applied federal maritime law in arriving at its decision.

On October 1, 1990 petitioner filed its petition with the California Supreme Court for review of the August 21, 1990 opinion of the California Court of Appeal. This petition was summarily denied on November 15, 1990. Pet. App. 11a. On January 22, 1991, this Court stayed all proceedings in the courts below.[11]

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS GRANTED CARNIVAL'S PETITION FOR CERTIORARI IN *SHUTE* (NO. 89-1647) WHICH PRESENTS THE IDENTICAL ISSUE.

This case presents the question of whether and when a forum selection clause in a passenger ticket contract can be enforced to require dismissal or stay of an action brought in a forum other than the one specified in the contract.

On October 1, 1990, this Court granted Carnival's petition for certiorari in *Carnival Cruise Lines, Inc. v. Shute, et al.* (No. 89-1647). Oral argument was had on January 15, 1991. *Shute* presents the identical issue of

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tion 418.10 (. . . right to review of an order of denial on mandamus)". *Id.*, 161 Cal.App.3d at 425, 207 Cal.Rptr. at 650.

[11] The text of the Court's order is reproduced as Pet. 12a-13a.

law for decision, namely the enforceability under federal maritime law of a forum selection clause in a passenger ticket contract for an ocean voyage. The California Court of Appeal expressly followed the Ninth Circuit's opinion in *Shute, et al. v. Carnival Cruise Lines, Inc.*, 897 F.2d 377 (9th Cir. 1990). Carnival therefore requests that the Court hold this petition pending its decision in *Shute*. If the Court then resolves the forum selection issue in a way that is inconsistent with the California Court of Appeal's approach, Carnival requests that its petition in this case be granted, the decision below vacated, and the case remanded. Alternatively, the Court may find it desirable in reaching its decision on this issue in *Shute* to consider also the factual record of this case, which describes how a passenger can obtain and review the terms of the contract before purchasing the ticket.

If this Court should decide only the issue of *in personam* jurisdiction presented in *Shute* and not reach the forum selection issue, Carnival requests that this petition be granted for the following reasons.

II. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AND STATE COURTS AS TO THE VALIDITY OF FORUM SELECTION CLAUSES IN PASSENGER TICKET CONTRACTS.

In *M/S BREMEN, et al. v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (*"The BREMEN"*) this Court most recently held, in a case involving an international commercial agreement, that admiralty law establishes a strong presumption in favor of enforcing a forum selection clause. The California Court of Appeal in this case correctly stated that the cruise ticket was governed by federal maritime law. Pet. App. 8a. It adopted the reasoning of *Shute, supra*, 897 F.2d 377 (9th Cir. 1990) which held that the test set forth by *The BREMEN* is controlling. *Id.* However, like the Ninth Circuit in *Shute*, the California Court of Appeal found that the pre-

sumption of validity of forum selection clauses mandated by *The BREMEN* was overcome on two grounds: first, the clause, as part of a pre-printed contract submitted to respondents on a "take-it-or-leave-it" basis did not represent the intent of the parties, and second, the inconvenience to some of the respondents of litigating the claim in Florida would effectively deprive them of their day in court. Pet. App. 10a.

In following *Shute*, the California Court of Appeal's opinion is in square conflict with the holding of the Third Circuit in *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905 (3d Cir. 1988), *cert. dismissed*, 490 U.S. 1001 (1989).[12] Its approach to the enforcement of a term in a cruise ticket also conflicts with that of the First, Second, Third, Fourth, Fifth, and Sixth Circuits.

This Court should grant certiorari in this case to resolve the conflict between the circuits on this issue, which is regularly presented for decision in lawsuits involving travel.[13]

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[12] The decision of the California Court of Appeal is also in conflict with the decision of the Fourth Circuit in *Catalana v. Carnival Cruise Lines, Inc.*, 618 F.Supp. 18 (D.Md. 1984), *aff'd*, 806 F.2d 257 (4th Cir. 1986). In that case, the district court ruled that the forum selection clause in the passenger ticket was incorporated into the terms of the contract between the carrier and the passenger, and enforced the clause. The Fourth Circuit affirmed without issuing an opinion for publication.

[13] Numerous district courts have been confronted with the question of whether to enforce a forum selection clause in a passenger ticket contract. *See Everett v. Carnival Cruise Lines, Inc.*, 677 F.Supp. 269 (M.D.Pa. 1987); *Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F.Supp. 563 (S.D.N.Y. 1987); *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F.Supp. 318 (S.D. Tex. 1985); *Luby, et al. v. Carnival Cruise Lines, Inc.*, 1986 A.M.C. 2326 (D.Md. 1985). The clauses were enforced in all of these cases, and in *Walker v. Carnival Cruise Lines, Inc.*, 681 F.Supp. 470 (N.D.Ill. 1987), the court indicated it would enforce the clause unless the passenger "produces affidavits which convince us [enforcement] would be truly burden-

A. Federal Maritime Law Strongly Favors Enforcement of Forum-Selection Clauses.

In *The BREMEN*, the Court enforced a forum selection clause in a maritime contract for the towing of an oil drilling rig from Louisiana to the Adriatic Sea. After the rig was damaged at sea and taken to Tampa, Florida, the owner of the rig sued in federal court in Tampa instead of in the contractually designated forum of London. 407 U.S. at 3-4. Both lower courts rejected the defendant's motion to dismiss or stay based on the forum selection clause, holding that the defendant had not met its burden to show that London would be a more convenient forum than Tampa. *Id.* at 6-8.[14]

The Court reversed and held that "the forum selection clause should control absent a strong showing that it should be set aside." *Id.* at 15. The Court imposed the burden on the party opposing enforcement of the clause to "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching". *Id.* It specifically rejected the balance-of-convenience test employed by the lower courts to evaluate whether enforcement of the

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some . . . or otherwise unjust." *Id.* at 479. In the litigation leading to *Lauro Lines, supra,* 490 U.S. 495, the district court held that the forum selection clause was not enforceable. *See Klinghoffer, et al. v. Achille Lauro, et al.,* 1988 A.M.C. 636 (S.D.N.Y. 1987).

[14] The Court of Appeals also relied partly on the likelihood that the London court would enforce an exculpatory clause in the contract, relieving the defendant of liability in contravention of federal maritime law. *Id.* at 8 nn.2, 8. There is of course no issue as to choice of law in this case; since the allegedly negligent conduct of petitioner that respondents complain of qualifies as a maritime tort, federal maritime law will govern the respondents' claims whether brought in California or Florida. *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959). *See also Everett v. Carnival Cruise Lines, Inc.,* 912 F.2d 1355 (11th Cir. 1990), applying federal maritime law to a passenger case transferred from Pennsylvania to Florida pursuant to a forum selection clause in the ticket.

clause would have been reasonable, and found that the district court had wrongly burdened the party seeking enforcement of the clause to establish its validity. *Id.* at 18. The Court then remanded the case to allow the party challenging enforcement of the clause an

> opportunity to carry its heavy burden of showing not only that the balance of convenience is strongly in favor of [a non-contractual forum] . . . but also that . . . trial [in the contractual forum] will be so manifestly and gravely inconvenient . . . that it will be effectively deprived of a meaningful day in court. *Id.* at 19.

Although the parties in *The BREMEN* had specifically negotiated certain portions of their contract,[15] the Court noted that the standards it had set forth to determine enforceability of a forum selection clause applied even where certain facts "might suggest that the agreement was an adhesive one." *Id.* at 17.

B. The California Court of Appeal's (and *Shute's*) Approach Toward Enforceability of Provisions in a Cruise Ticket Contract Conflicts With That of the First, Second, Third, Fourth, Fifth, and Sixth Circuits.

Courts have regularly enforced clauses in cruise tickets even when the passenger did not specifically bargain for the particular clause, provided the terms of the ticket were reasonably communicated to the potential passenger. The First, Second, Third, Fourth, and Fifth Circuits have upheld clauses in tickets for passage on cruise ships as contractually binding terms.[16] These circuits have pre-

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[15] The party opposing the clause in *The BREMEN* filed an affidavit that "no specific negotiations concerning the forum clause took place." 407 U.S. at 13, n.14.

[16] *See Shankles, et al. v. Costa Armatori, S.P.A., et al.*, 722 F.2d 861 (1st Cir. 1983); *DeNicola v. Cunard Line Ltd.*, 642 F.2d 5 (1st Cir. 1981); *Spataro v. Kloster Cruise, Ltd., etc.*, 894 F.2d 44 (2d Cir. 1990); *Geller v. Holland-America Line*, 298 F.2d 618 (2d Cir.), *cert. denied*, 370 U.S. 909 (1962); *Hodes, supra*, 858 F.2d at 909-

sumed that the passenger impliedly consented to the terms of the contract if he or she had adequate notice of the ticket's terms and then used the ticket. To determine whether the ticket provided adequate notice to the passenger of its terms, these circuits focused on the physical characteristics of the ticket (e.g., type and size of lettering, color contrast, references on the face of the ticket to the terms on the following pages), and the language therein. If the provision was adequately incorporated and clear and unambiguous, it was enforced as part of the contract. The Sixth and other circuits have followed the same analytical approach when denying enforcement of particular clauses.[17]

Some circuits, such as the First Circuit (*see Shankles, supra*, 722 F.2d 861) and the Third Circuit (*see Hodes, supra*, 858 F.2d at 911-12), have proceeded further to examine the circumstances surrounding how and when the passenger received the ticket to determine whether he or she had sufficient opportunity to review its terms and conditions.[18] If the passenger had such an opportunity,[19]

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912 (3d Cir. 1988); *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir.), *cert. denied*, 484 U.S. 852 (1987); *Catalana v. Carnival Cruise Lines*, 618 F.Supp. 18 (D.Md. 1984), *aff'd*, 806 F.2d 257 (4th Cir. 1986); *Carpenter v. Klosters Reederi A/S*, 604 F.2d 11 (5th Cir. 1979).

[17] *Barbachym, et al. v. Costa Line, Inc., et al.*, 713 F.2d 216 (6th Cir. 1983); *Muratore v. M/S SCOTIA PRINCE*, 845 F.2d 347 (1st Cir. 1988); *Silvestri v. Italia Societa per Azioni Di Navigazione*, 388 F.2d 11 (2d Cir. 1968) (Friendly, J.); *see also The Majestic*, 166 U.S. 375 (1897). In these cases, the courts held the passenger was not bound by the terms because the terms were not incorporated into the ticket.

[18] This analytical approach is also employed by courts enforcing terms in tickets for other forms of travel. *See New York Central & Hudson River Railroad Co. v. Beaham*, 242 U.S. 148 (1916) (railroad ticket); *Diero v. American Airlines, Inc.*, 816 F.2d 1360 (9th Cir. 1987), and *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965) (airline tickets).

[19] No court has imposed the requirement that the passenger have actual notice of the terms in the ticket. *See Hodes*, 858 F.2d at

these courts assumed the passenger impliedly consented to the terms in the ticket and enforced them as part of a contract.[20] It was not necessary for the passenger to assent expressly to the terms of the ticket in order for them to be enforced. *DeNicola v. Cunard Line Ltd.*, 642 F.2d at 8, n.3 (1st Cir. 1981). Other courts have explicitly rejected passengers' contentions that tickets should not be enforced because they were contracts of adhesion and the product of unequal bargaining power.[21]

The California Court of Appeal's decision and the Ninth Circuit's decision in *Shute* conflict with this approach.

911-12; *DeNicola*, 642 F.2d at 8, n.3; *Carpenter*, 604 F.2d at 13; *Geller*, 298 F.2d at 619. *See also Diero*, 816 F.2d at 1363-65.

[20] Some respondents contend (as did the Shutes and the Hodeses) that they did not have an opportunity to review the terms of the ticket and therefore cannot be assumed to have assented to them. However, the California Court of Appeal did not address this claim. It is unclear whether this was because it concluded that the ticket was presented to the respondents on a "take-it-or-leave-it" basis and therefore could not represent the intent of the parties. Nevertheless, its opinion quotes those portions from the respondents' attorney's January 29, 1990, declaration which recite that fifty-nine respondents allegedly did not have possession of their tickets in time to review the contents. This information would only be relevant to the issue of whether each respondent had an opportunity to review the terms of the ticket so as to be contractually bound by them.

The Hodeses specifically contended that their tickets were held for them by the travel club through which they purchased the tickets until they boarded the ship. *Hodes, supra*, 858 F.2d at 911-12. The Third Circuit observed that the Hodeses could have requested an opportunity to review the tickets in advance and held that, in any event, the club was serving as agent for the Hodeses; the Hodeses were consequently charged with notice of the terms. *Hodes, supra* at 911-12. *Compare, Muratore v. M/S SCOTIA PRINCE*, 845 F.2d 347 (1st Cir. 1988).

[21] *Hodes, supra*, 858 F.2d at 912-13; *Wilkinson v. Carnival Cruise Lines, Inc., supra*, 645 F.Supp. at 321; *Walker v. Carnival Cruise Lines, Inc., supra*, 681 F.Supp. at 478-79; *Kelly v. The S/S QUEEN ELIZABETH 2, etc., et al.*, 1986 A.M.C. 349, 354-55 (S.D.N.Y. 1985). *See also Shankles, supra*, 722 F.2d at 863-64.

They concur that no contract is formed unless there is agreement between the parties, but decline to follow the other circuits which conclude that the passenger assents to terms that are properly incorporated into the ticket which the passenger has an opportunity to read. Instead, they find a great disparity in bargaining power between the cruise company and the passenger, and, based on this perceived disparity, hold that the clause can only become part of the contract and bind the passenger if it was "freely negotiated".[22] They also impose the burden on the party seeking to enforce the clause to show that the clause was the result of bargaining.

This approach creates a conflict between the circuits and state courts with regard to enforcement of any clause in a ticket for passage that is part of a pre-printed form.

C. The Decision of the California Court of Appeal to Refuse to Enforce a Forum Selection Clause Is Squarely in Conflict With That of the Third Circuit in *Hodes*.

In *Hodes*, the Third Circuit enforced a forum selection clause in a pre-printed passenger ticket contract. Although the California Court of Appeal's opinion relies

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[22] Neither *Shute* nor the California Court of Appeal specify what they mean by "negotiation" or "freely bargained for" but conceivably expect visible, interactive give-and-take during the formative stages of the contract, which, presumably, would need to include the option of altering each term.

In *Northwestern National Ins. Co. v. Donovan*, 916 F.2d 372 (7th Cir. 1990) (Posner, J.) the Seventh Circuit explained the difficulty such a requirement would impose: "Ours is not a bazaar economy in which the terms of every transaction, or even of most transactions, are individually dickered; even when they are, standard clauses are commonly incorporated into the final contract, without separate negotiation of each of them." *Id.* at 377. Although *Donovan* enforced a forum selection clause in a non-maritime context and did not apply federal maritime law (the court also exhibits incomplete awareness of the facts in *Shute*), its description of the reality of modern consumer commercial transactions is accurate and just as applicable to this case.

only on the *Shute* decision to arrive at its holding and does not refer to the Third Circuit's contrary analysis and result in *Hodes*, the issues pertaining to the forum selection clauses in these actions are essentially identical.

Like the California Court of Appeal, the Third Circuit acknowledged that *The BREMEN* was controlling. *Id.* at 912. In applying *The BREMEN*, however, the Third Circuit rejected the very arguments that the California Court of Appeal accepted as to the enforceability of the clause. The Third Circuit recognized that sophisticated businessmen had negotiated the contract at issue in *The BREMEN*, and that a different set of circumstances existed in *Hodes* since the defendant cruise company had a superior bargaining position to the purchasers of the ticket and no specific bargaining of the ticket's terms was shown to have occurred. It nevertheless held that the cruise company "did not take unfair advantage of that position to 'overween' the Hodeses." *Id.* at 913. It also reviewed the physical characteristics of the ticket and found that the forum selection clause was reasonably communicated to the Hodeses. It additionally found they had an opportunity to review the terms and therefore were bound by them.

The California Court of Appeal, however, did not scrutinize the physical characteristics of the ticket to determine whether the forum selection clause was incorporated into the ticket, and did not address the claim of some of the respondents that they had not received an opportunity to read the terms of the ticket. Instead, it found the forum selection clause to be "invalid as the product of overreaching, i.e., a contract of adhesion." Pet. App. 9a. It did not describe how petitioner had overreached. While it acknowledged that the undisputed evidence showed that any respondent could have obtained a copy of the terms and conditions in petitioner's ticket prior to deciding to purchase the ticket (Pet. App. 7a), it found this irrelevant because "[n]o evidence was submitted by Carnival with regard to the procedure, if any,

for negotiation of the terms of the ticket contract . . . ." Pet. App. 7a, n.5.[23]

The Third Circuit in *Hodes* found the forum selection clause was reasonable and should be enforced. It pointed out the cruise company had a legitimate interest in seeking certainty as to where suit could be brought against it because its cruise ship travelled to a number of jurisdictions and drew passengers worldwide. It also rejected the claim of the Hodeses that they would "for all practical purposes be deprived of [their] day in court," *id.* at 916 (*quoting The BREMEN*, 407 U.S. at 18) because the Hodeses could not show either that they "would face blatant prejudice in the foreign forum" or that litigation in the contractual forum "would be severely impractical." 858 F.2d at 916.[24]

The California Court of Appeal also recited *The BREMEN* standard, but it failed to properly apply it to determine whether it would be unreasonable to enforce the contract clause.[25] It considered only the convenience to respondents from the lawsuits remaining in California, and, with regard to the two hundred thirty-eight respondents in *Williams*, relied exclusively on the conclusory hearsay declarations of their attorney.[26]

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[23] *See also* discussion *supra* at n.22.

[24] The Hodeses also advanced a public policy argument, based on 46 U.S.C. §§ 183b and 183c and on common law, that the forum selection clause was invalid because Italian law might enforce provisions of the contract limiting the amount of defendant's liability for negligence. 858 F.2d at 914-15. Following *The BREMEN*, the court rejected that argument. *Id.* No such issue of choice of law is present in this case since federal maritime law will apply even if the lawsuits are required to proceed in Florida. *See* n.14, *supra*.

[25] A refusal to enforce a forum selection clause is subject to review *de novo*. *Hodes, supra*, 858 F.2d at 908-9. (Cites omitted).

[26] No other declarations or testimony were submitted on behalf of these 238 respondents.

The California Court of Appeal acknowledged petitioner's evidentiary objections (Pet. App. 5a, n.3) but sought to justify its

It did not weigh the inconvenience to Carnival, and failed to evaluate the totality of factual circumstances by not considering the following undisputed evidence in the record: the M/V TROPICALE is more accessible from the contract forum of Florida since the vessel no longer calls at the West Coast of the United States but is sailing in the Caribbean;[27] the majority of Carnival's fact witnesses (who were among the 500 plus crew onboard the M/V TROPICALE during the voyage in question) are either onboard the M/V TROPICALE or on one of Carnival's six other vessels sailing from Florida;[28] Carnival's principal place of business, legal department and passenger claims department are in Miami, Florida (Pet. App. 17a-18a).

Further, the Court of Appeal did not consider that two hundred thirty-eight respondents had pooled their resources together, hired one lawfirm and filed one complaint. Each of these respondents will be able to minimize the impact of the increased financial cost, if any, of the lawsuit proceeding in Florida by dividing the extra expense between themselves. It also failed to note that any court in Florida will be as qualified to offer respondents any relief they may prove themselves to be entitled to receive. This limited and one-sided inquiry

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reliance on the hearsay declarations by stating that "[p]laintiffs would substantiate the information in question . . . when they are deposed or in response to interrogatories." *Id.* This conclusion, based on speculation, not only does not protect petitioner but also irreparably prejudices it because once it answers in the actions and propounds interrogatories, it will be deemed by state procedural law to have waived its right to enforce the forum selection clause. *See* nn.5 and 6, *supra*.

[27] The location of the vessel is highly relevant during discovery given respondents' wide-ranging complaints regarding every facet of operation of the ship. These allegations are summarized in the California Court of Appeal's opinion, Pet. App. 2a-3a.

It will no doubt also be beneficial for the jury to view the physical structure and premises onboard. *See Hodes*, 858 F.2d at 916.

[28] *See* declaration of Winson, reproduced at Pet. App. 17a-18a.

violates this Court's directive in *The BREMEN* that, among others things, the party opposing the contract clause show that the "*balance* of convenience" (emphasis added) strongly favors a non-contractual forum before a forum selection clause is found unreasonable.

The inter-circuit conflict on this issue was not resolved by the Court's decision in *Stewart Organization, Inc., et al v. Ricoh Corp.*, 487 U.S. 22 (1988), which addressed the enforcement of a forum selection clause under federal procedural law, i.e., 28 U.S.C. § 1404(a).[29] Nevertheless, *Stewart*'s approval of a general policy of giving weight to forum selection clauses should have been taken into account by the California Court of Appeal. *See Stewart*, 487 U.S. at 29, 31; *id.* at 33 (Kennedy, J., concurring).[30]

D. This Is an Appropriate Case for Resolving the Issue Presented.

This case, along with *Shute*, presents an occasion for the Court to resolve an inter-circuit and state court conflict regarding enforcement of forum selection clauses in ticket contracts, which is an issue that arises frequently in federal and state court litigation. Uniform national application of federal maritime law is particularly desirable on this issue to achieve the certainty and predictability that such clauses are intended to achieve. Because of this Court's decision in *Lauro Lines* terminating interlocutory appeals from federal courts on this

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[29] In *The BREMEN* this Court enforced a forum selection clause under federal maritime law without entering into the analysis of factors relevant to § 1404(a). There is no indication that *Stewart* was intended to modify the holding of *The BREMEN* in this regard.

[30] Such a policy enhances predictability, permits courts to avoid expending their resources to have to resolve motions brought to enforce such clauses, and reduces for parties the costs associated with litigation. *See Stewart*, 487 U.S.C. at 33 (Kennedy, J., concurring).

issue, the issue is now less likely to be brought for review before an appellate court. However, in light of the recently created conflict among the circuits and state courts, this issue is now likely to be litigated more frequently.

The record shows that respondents had an opportunity to obtain and review all terms and conditions of the ticket well before they purchased the tickets and used them for the cruise. It also shows that respondents failed to meet their heavy burden as set forth in *The BREMEN* of showing why they should be allowed to escape the effect of the forum selection clause. The analytical approach employed by the First, Second, Third, Fourth, Fifth and Sixth Circuits satisfactorily reflects commercial realities and protects passengers. There is no necessity or justification for imposing on carriers the onerous obligation to show that each passenger freely bargained for each clause in the ticket before a clause can be enforced. Any such procedure would be commercially impractical, and would only prevent enforcement of forum selection clauses.

Carriers have a legitimate interest in limiting disputes contractually to a reasonable forum, especially where multiple claims arise from a single incident. The *Hodes* litigation and the *Lauro Lines* litigation, both arising from the *Achille Lauro* tragedy, illustrate the possibility of related claims being brought in various jurisdictions.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

COURT OF APPEAL, SECOND DISTRICT
DIVISION 3

B050142, B050255

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF LOS ANGELES,
Respondent,

MILDRED WILLIAMS, *et al.*,
Real Parties In Interest.

Aug. 21, 1990

Graham & James and Allan A. Shenoi, for petitioner.

No appearance, for respondent.

Silver, McWilliams, Stolpman, Mandel, Katzman, Krissman & Elber, Donna Silver, Roman Mosqueda and Miguel P. Inumerable, for real parties in interest.

DANIELSON, Associate Justice.

Carnival Cruise Lines, Inc. (Carnival) petitions this court for writs of mandate directing the trial court to vacate its orders denying their motions to dismiss or stay in Williams v. Carnival Cruise Lines, Inc. (LASC No. SOC 96347) (*Williams*) and Secard v. Carnival Cruise Lines, Inc. (LASC No. SOC 96301) (*Secard*) and to enter new and different orders granting the motions.

We have consolidated the two proceedings since they present identical questions of law and fact.

We deny the petitions and discharge the alternative writs.

ISSUE PRESENTED

Tickets purchased by plaintiffs in the underlying actions (plaintiffs), for a roundtrip cruise from Los Angeles to Mexico and back on a ship owned and operated by Carnival, contained a forum-selection clause which provided that all disputes arising under or in connection with the ticket contract would be litigated, if at all, in a court located in Florida. The core issue presented is whether that forum-selection clause is enforceable to preclude plaintiffs from pursuing their actions in the Los Angeles, California, Superior Court, for damages sustained by them during their cruise as a result of the alleged negligence of Carnival.

We hold that, under the facts of this case, the forum-selection clause in the Carnival ticket contract is not enforceable.

FACTUAL AND PROCEDURAL STATEMENT

Plaintiffs assert that they received injuries through the negligence of Carnival during a seven-day sea cruise as passengers on a ship, the M/V Tropicale, owned and operated by Carnival. The voyage allegedly began on or about January 17, 1988, at Port of Los Angeles, was bound for Puerto Vallarta and other places in Mexico, and ended on or about January 24, 1988, at Port of Los Angeles.

In sum, plaintiffs allege that Carnival was negligent in that: (1) it knew of an impending severe storm, but failed to inform plaintiffs of the dangers thereof; (2) it proceeded to leave port despite the storm warning and without taking proper precautions to minimize the effects of the storm; (3) it failed to provide adequate

safety equipment, e.g., life jackets and/or life vests for all passengers, or to distribute the safety equipment which was aboard the ship to the passengers; (4) it failed to properly staff the vessel and to train the staff to meet the safety needs of the passengers in an emergency situation; (5) it failed to provide adequate safety instructions and directions to the passengers and crew; (6) it failed properly to inspect the ship and maintain it in a safe condition, e.g., the port engine and stabilizer did not function properly; (7) it failed to properly maintain, repair, inspect or otherwise control the M/V Tropicale and to assure its seaworthiness prior to and at the time of departure; and (8) it provided tug boat services which caused the M/V Tropicale to hit the dock as it was being assisted in leaving the port.

On September 15, 1989, in *Williams*, Carnival appeared specially and filed a motion to dismiss or stay under Code of Civil Procedure section 410.30.[1] Carnival argued that dismissal or stay of the action was mandated on the ground that plaintiffs had agreed to litigate any controversy arising from the subject voyage in the State of Florida.

On September 25, 1989, a substantially identical special appearance and motion was filed by Carnival in *Secard*.

In support of the motions, Carnival referred to the following provisions in the ticket contracts between itself and plaintiffs: [2]

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[1] Code of Civil Procedure section 410.30, subdivision (a), provides: "[W]hen a court upon motion of a party or on its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action."

[2] The record does not include a copy of any ticket. However, at oral argument, counsel for Carnival supplied the court with a facsimile of the subject tickets, which we have reviewed.

Clause 3(a) on page 1 of the contract read:

"The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket."

Caluse 8, also on page 1 of the ticket contract, read:

"It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country."

In his supporting declaration, dated September 14, 1989, at Miami, Florida, Bruce A. Jordan (Jordan), an assistant general counsel of Carnival, stated that Carnival is a Panamanian corporation with its principal place of business in Miami, Florida. He further stated that all passenger claims are handled exclusively in its Miami offices.

In opposition filed January 31, 1990, the *Williams* plaintiffs asserted the forum-selection clause was unenforceable. They argued that the clause was unreasonable, not reasonably communicated to plaintiffs, and not freely bargained for. They further argued that enforcement of the clause was barred by federal statute (46 U.S.C.App. § 183(c)) and would violate the principles set forth in *The Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 18, 92 S.Ct. 1907, 1917, 32 L.Ed.2d 513.

In her opposing declaration dated January 29, 1990, Donna Silver (Silver), an attorney for the *Williams* plaintiffs, stated: "[O]f the 238 plaintiffs, close to two-thirds of them (153) are California residents. Of the remaining 85 plaintiffs, close to one-half (38) are residents of Western states, including Oregon, Washington, Nevada, Arizona, New Mexico and Montana. The re-

maining 47 plaintiffs are from various Midwest and East coast states, Canada and Hawaii. Not a single plaintiff is a resident of Florida."

She further stated that the one plaintiff claiming awareness of the forum-selection clause prior to departure did not have cancellation insurance. The tickets were subject to cancellation charges by Carnival.

With respect to receipt of tickets, Silver stated: At least 44 of the plaintiffs received their tickets upon actual embarking of the vessel on January 17, 1988. At least five plaintiffs received boarding passes only, no ticket at all. At least six plaintiffs received their tickets on the day of departure, four of whom received them two hours before embarkation, and at least four plaintiffs received the tickets the day before the cruise.

With respect to inconvenience to plaintiffs, Silver stated: At least 30 plaintiffs asserted they are physically unable to travel to Florida due to age and medical problems. At least one-half of the remaining plaintiffs would suffer hardship and inconvenience due to health and medically related problems, dependency of minors and other family members, and work commitments. At least 145 plaintiffs, over one-half of all plaintiffs in *Williams*, contend they are financially unable to pursue their action in Florida.[3]

In opposition filed February 7, 1990, the *Secard* plaintiffs took the position that enforcement of the forum-selection provision would be unreasonable for the reasons that: (1) there was no evidence that the provision was

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[3] On April 3, 1990, Carnival filed objections to the contents of the Silver declaration. In response Silver filed a declaration dated April 9, 1990, in which she stated that the factual information set forth in her declaration above came from her personal review of communications between plaintiffs and herself. Plaintiffs would substantiate the information in question, i.e., paragraphs 4-12, when they are deposed or in response to interrogatories.

freely bargained for; and (2) plaintiffs would for all practical purposes be deprived of their day in court since enforcement of the provision would be gravely difficult and inconvenient.

In his opposing declaration Miguel P. Inumerable, the *Secard* plaintiffs' attorney, stated that among the witnesses who would be inconvenienced by a Florida forum are the physicians who treated the *Secard* plaintiffs and the employees of the United States Weather Service who reside and are employed in California.

In their respective declarations, the *Secard* plaintiffs, Antoinette, Ed, Fred, George, and Joan, each stated that he or she was treated for the injuries sustained during the voyage by Dr. Peter Yatar, of the City of Industry, California, and Dr. Dale Kellon, in Covina, California.

In its reply filed April 3, 1990, in both cases Carnival asserted the forum-selection clause was enforceable. It argued that the passengers had adequate notice of the terms of the contract, including the forum-selection clause, since there was adequate warning of the ticket's terms, and thus, it must be presumed that the passengers consented to the clause. It further argued that enforcement of the clause was not unreasonable or unjust since plaintiffs would have a difficult time showing that they would be denied their day in court in Florida.

In his supporting declaration, executed March 29, 1990, Lawrence D. Winson (Winson),[4] General Counsel and Secretary for Carnival, stated that Carnival chose one

[4] The motions to stay or dismiss were not made on the grounds of lack of personal jurisdiction or forum non conveniens. However, in its petitions Carnival makes some arguments and sets forth statements in the declarations of Winson and Jordon in favor of the enforcement of the forum-selection clause which really pertain only to a claim of forum non conveniens and the bar of lack of personal jurisdiction, e.g., lack of minimum contracts with California. (See, e.g., *Dialysis At Sea, Inc. v. Superior Court* (1989) 216 Cal.App.3d 788, 792-796, 265 Cal.Rptr. 71.)

specific venue for litigation against it in order to prevent it from being sued in varied and far-flung jurisdictions by thousands of passengers. Carnival inserted the forum-selection clause to create a certainty, not to inconvenience passengers or arbitrarily, so that it would not face global litigation.

Winson further stated that Florida was selected as the venue, because its head office, legal department, and passenger claims processing personnel are all located there. Also located there were seven of its eight vessels which sail from Florida and Caribbean ports.

Winson also declared that if any passenger or travel agent requested Carnival to provide them with a copy of the terms and conditions of the ticket contract in order for them to evaluate the terms and decide whether they wanted to travel with Carnival, Carnival would have provided them with a copy.[5]

On April 12, 1990, following a hearing, the court denied the motions, in the *Williams* and *Secard* cases. The court reasoned:

"I cite the case cited by moving party, which is Full-Sight versus Soft-Lenses. First you have a contract [of] adhesion and, in my view, it would be, under that case, both unreasonable and unjust to transfer these cases for the benefit of one defendant in Florida, as opposed to the convenience of two hundred thirty-eight or more plaintiffs in California, where the vessel left a California port, the storm occurred in the Pacific, whatever medical treatment they received on ship was on an emergency basis, and upon the return was rendered here. [¶] This is the

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[5] No evidence was submitted by Carnival with regard to the procedure, if any, for negotiation of the terms of the ticket contract, *e.g.*, the forum-selection clause. At oral argument counsel for Carnival conceded he knew of none.

logical and the just place for the venue to be laid in this case." [6]

DISCUSSION

The sole issue presented by this writ proceeding is whether enforcement of the forum-selection clause would be unfair, unreasonable or unjust or otherwise invalid. We hold that the forum-selection clause, which designates Florida as the proper venue, is unenforceable on the grounds that enforcement would be "unfair, unjust, or unreasonable," and the clause is also invalid as the product of over-reaching.

Federal law governs the validity of the forum selection clause in this instance since a passenger ticket contract for an ocean voyage constitutes a contract under maritime law. (See, e.g., *Hodes v. S.N.C. Achille Lauro ed. Altri-Gestione* (3d Cir. 1988) 858 F.2d 905, 909; *Shute v. Carnival Cruise Lines* (9th Cir. 1990) 897 F.2d 377, 386.)

It is established that a forum-selection clause is prima facie valid and that such a clause should not be set aside unless the party challenging it can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." (*The Bremen v. Zapata Off-Shore Co., supra*, 407 U.S. 1, 15, 92 S.Ct. 1907, 1916; *Shute v. Carnival Cruise Lines, supra*, 897 F.2d 377, 388.)

In *The Bremen* the United States Supreme Court upheld a forum-selection clause designating the London Court of Justice as the proper venue for any dispute arising from the contract between Zapata, an American corporation, and Unterwesser, a German corporation, whereby Unterwesser agreed to tow a Zapata oil rig from Louisiana to some point in the Adriatric Sea off Ravenna, Italy. After the rig was damaged in the Gulf of Mexico,

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[6] The case referred to above by the court is *Full-Sight Contact Lens v. Soft Lenses, Inc.*, 466 F.Supp. 71 (S.D.N.Y., 1978).

Zapata brought an action in a Florida United States district court. In upholding the forum-selection clause *The Bremen* court found that Zapata had failed to meet its burden to "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." (*The Bremen v. Zapata Off-Shore Co., supra,* 407 U.S. 1, 15, 92 S.Ct. 1907, 1916.)

The *Shute* court found *The Bremen* to be factually distinguishable, noting: ". . . *The Bremen* involved a large, complex commercial contract between two sophisticated parties. There was no evidence in *The Bremen* that the parties were in an unequal bargaining position. [Citation.]" (*Shute v. Carnival Cruise Lines, supra,* 897 F.2d 377, 388.)

In *Shute* the court had before it the identical forum-selection clause involved in the proceedings now before this court. (*Id.* at p. 379.) The *Shute* court held that this clause was unenforceable on two independent grounds: "First, there is no evidence that the provision was freely bargained for" (*id.* at p. 388); and second, "[t]he fact that enforcement of the clause in this case would 'be so gravely difficult and inconvenient' that the plaintiffs would 'for all practical purposes be deprived of [their] day in court,' [citation] provides an independent justification for refusal to enforce the forum selection clause. [Citation.] . . . There is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida." (*Id.* at p. 389.)

Based on our review of the record and applicable law we conclude that the trial court was correct in finding that the subject forum-selection clause was invalid as the product of overreaching, i.e., a contract of adhesion, and was unenforceable in that it would be unreasonable and unjust for venue to lie in Florida.

In the present cases, as in *Shute*, there is no evidence that the forum-selection clause was freely bargained for by the plaintiffs; thus it constitutes an instance of untenable "overreaching" by Carnival. As the *Shute* court aptly reasoned: "To the contrary, the provision is printed on the ticket, and presented to the purchaser on a take-it-or-leave-it basis. . . . Even if we assume that the Shutes had notice of the provision, there is nothing in the record to suggest that the Shutes could have bargained over this language. Because this provision was not freely bargained for, we hold that it does not represent the expressed intent of the parties, and should not receive the deference generally accorded to such provisions." (*Shute v. Carnival Cruise Lines, supra*, 897 F.2d at pp. 388-389; fns. omitted.)

An independent, alternative basis for holding the forum-selection clause to be unenforceable is our conclusion that enforcement of the clause "would 'be so gravely difficult and inconvenient' that the plaintiffs would 'for all practical purposes be deprived of [their] day in court' ". (*Shute v. Carnival Cruise Lines, supra*, 897 F.2d at 389, quoting from *The Bremen, supra*, 407 U.S. at p. 18, 92 S.Ct. at p. 1917.) The evidence reflects that some of the plaintiffs would be physically and financially incapable of pursuing their action against Carnival in Florida.

DECISION

The petitions for writs of mandate are denied. The alternative writs, having served their purpose, are discharged.

KLEIN, P.J., and CROSKEY, J., concur.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

Second Appellate District, Division Three, No. B050142
S017717

CARNIVAL CRUISE LINES INC.,
Petitioner

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent

MILDRED WILLIAMS *et al.*,
Real Parties In Interest

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

[Filed Nov. 15, 1990]

Petition for review DENIED.

/s/ Lucas
Chief Justice

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

January 22, 1991

JOSEPH F. SPANIOL, JR.
Clerk of The Court

Mr. Allan A. Shenoi
Graham & James
One World Trade Ctr., Ste. 1800
Long Beach, CA 90831-1800

RE: Carnival Cruise Lines, Inc. v. Superior Court of California, County of Los Angeles (Mildred Williams, et al., real parties in interest)

—and—

Carnival Cruise Lines, Inc. v. Superior Court of California, County of Los Angeles (Antoinette Secard, et al., real parties in interest) No. A-540

Dear Mr. Shenoi:

The Court today entered the following order in the above-entitled case:

"The application to stay proceedings in the Superior Court of California, County of Los Angeles, case Nos. SOC 96347 and SOC 96301, presented to Justice O'Connor and by her referred to the Court is granted pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this order is to terminate automatically. In the event the petition for a writ of certiorari is granted, this order is to remain in effect pending the issuance of the mandate of this Court to the Court of Appeal of California, Second District, Nos. B050142 and B050255."

Very truly yours,

JOSEPH F. SPANIOL, JR.
Clerk

By /s/ Christopher W. Vasil
CHRISTOPHER W. VASIL
Deputy Clerk

em

cc: Donna Silver
Roman P. Mosqueda
Clerk, Superior Court of California, County of Los Angeles (Your Nos. SOC 96347 and SOC 96301)
Clerk, Court of Appeal of California, Second District (Your Nos. B050142 and B050255)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT SOUTH H
HON. WILLIAM M. SUTTON, JR., JUDGE

No. SOC 96347

MILDRED WILLIAMS,
Plaintiff,
vs.
CARNIVAL CRUISE LINES, INC.,
Defendant.

No. SOC 96301

ANTOINETTE SECARD, *et al.*,
Plaintiff,
vs.
CARNIVAL CRUISE LINES, INC., *et al.*,
Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Thursday, April 12, 1990

APPEARANCES:

For the Plaintiff:

SILVER, MCWILLIAMS, STOLPMAN,
MANDEL, KATZMAN & KRISSMAN
By: DONNA SILVER
Los Angeles Harbor Law Building
1121 North Avalon Boulevard
Wilmington, California 90744-3598

For the Plaintiff:

LAW OFFICES OF ROMAN P. MOSQUEDA
By: MIGUEL INUMERABLE
3610 Atlantic Boulevard
Long Beach, California 90807

For the Defendant:

GRAHAM & JAMES
By: ALLAN A. SHENOI
100 Oceangate
Suite 300
Long Beach, California 90802

[1] LONG BEACH, CALIFORNIA
THURSDAY, MARCH 12, 1990
A.M. SESSION

THE COURT: Twenty-one and twenty-two.

MR. SHENOI: Good morning, Your Honor.

Allan Shenoi on behalf of Carnival.

MR. INUMERABLE: Good morning.

Miguel Inumerable on behalf of plaintiffs on number twenty-one.

MS. SILVER: Donna Silver, on number twenty-two, on behalf of plaintiff Mildred Williams, et al.

THE COURT: I cite the case cited by moving party, which is full-sight versus soft-lenses. First you have a contract adhesion; and, in my view, it would be, under that case, both unreasonable and unjust to transfer these cases for the benefit of one defendant in Florida, as opposed to the convenience of two hundred thirty-eight or more plaintiffs in California, where the vessel left a California port, the storm occurred in the Pacific, whatever medical treatment they received on ship was on an emergency basis, and upon the return was rendered here.

This is the logical and the just place for the venue to be laid in this case.

[2] And so the motions are denied.

MS. SILVER: Thank you, Your Honor.

MR. INUMERABLE: Thank you, Your Honor.

THE CLERK: Is noticed waived?

MR. SHENOI: No.

THE COURT: All right. Respondent on each motion give notice.

MR. INUMERABLE: Thank you, Your Honor.

MS. SILVER: Thank you, Your Honor.

MR. SHENOI: Thank you.

(The proceedings in the above-entitled matter were concluded.)

DECLARATION OF LAWRENCE D. WINSON

[Filed by Petitioner with the California Superior Court on April 3, 1990]

I, Lawrence D. Winson, declare as follows:

1. I am General Counsel and Secretary for Carnival Cruise Lines, Inc., a Panamanian corporation, and in that capacity am familiar with its policies, personnel, records, ticket contract of passage, and business volume and practices.

2. Carnival currently has eight cruise vessels. Each year tens of thousands of passengers travel from many different and distant destinations and countries to ports such as Acapulco, Mazatlan, Cabo San Lucas, Los Angeles, Puerto Rico, Miami, and other ports, to travel on Carnival ships.

3. Carnival chose one specific venue for litigation against it, in order to prevent itself from being sued in the varied and far-flung home jurisdictions of literally thousands of passengers.

4. Carnival did not arbitrarily introduce the forum selection clause in its ticket contract of passage to inconvenience passengers. It did so because the forum selection clause creates certainty as to where suit against Carnival can be brought, and assures Carnival that it will not face global litigation.

5. If Carnival did not have a forum selection clause, it would experience much uncertainty, possibly great inconvenience and certainly significantly greater expense if suit could be brought against it anywhere where potential claimants might choose to sue.

6. Florida was selected as the venue because Carnival's head office is in Miami, Carnival's legal department and passenger claims processing personnel are all located in Miami, and seven of Carnival's eight vessels sail from

Florida and Caribbean ports. Although Carnival is a Panamanian corporation, it did not select a city in Panama as its choice for the contractually established venue, because it knew that such a selection would not be as related to Carnival's activities as a Florida forum.

7. The M/V TROPICALE is no longer sailing from Los Angeles, but is currently sailing weekly from the port of San Juan, Puerto Rico to St. Croix, Guadalupe, Grenada, La Guaira/Carracas and Aruba.

8. Accompanying the M/V TROPICALE in the Caribbean is its compliment of 500 plus offiers and crew. Many of these crewmembers were onboard the M/V TROPICALE during plaintiffs' cruise. Others are working on other Carnival ships sailing from Florida.

9. I have caused Carnival's business records for voyage 4804 (January 17-24, 1988) on the M/V TROPICALE to be reviewed, and from this review it has been determined that tickets for passengers Diana Fowler and Mr. Secard were mailed in the United States mail postage prepaid, to their travel agency, Express Travel, on November 23, 1987.

10. If any passenger or travel agent requested Carnival to provide them with a copy of the terms and conditions in its ticket contract in order for them to evaluate the terms of the ticket contract and decide whether they wanted to travel with Carnival, Carnival would have provided them with a copy.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed this 29th day of March, 1990, at Miami, Florida.

/s/ Lawrence D. Winson
LAWRENCE D. WINSON

STATUTES INVOLVED

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 410.30. Stay or dismissal of action; exceptions; duration of section

Text of section operative until Jan. 1, 1992.

(a) Except as provided in subdivision (b), when a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

(b) Subdivision (a) does not apply to an action arising out of, or relating to, a contract, agreement, or undertaking to which Section 410.40 applies.

(c) The provisions of Section 418.10 do not apply to a motion to stay or dismiss the action by a defendant who has made a general appearance.

This section shall remain in effect only until January 1, 1992, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1992, deletes or extends that date. If that date is not deleted or extended then, on and after January 1, 1992, pursuant to Section 9611 of the Government Code, Section 410.30 of the Code of Civil Procedure, as amended by Section 1 of Chapter 601 the Statutes of 1972, shall have the same force and effect as if this temporary provision had not been enacted.

§ 418.10. Motion to quash service of summons or to stay or dismiss action; procedure

(a) A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion either or both:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her.

(2) To stay or dismiss the action on the ground of inconvenient forum.

(b) The notice shall designate, as the time for making the motion, a date not more than 30 days after filing of the notice. The notice shall be served in the same manner, and at the same times, prescribed by subdivision (b) of Section 1005. The service and filing of the notice shall extend the defendant's time to plead until 15 days after service upon him or her of a written notice of entry of an order denying his or her motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days.

(c) If the motion is denied by the trial court, the defendant, within 10 days after service upon him or her of a written notice of entry of an order of the court denying his or her motion, or within any further time not exceeding 20 days that the trial court may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action. The defendant shall file or enter his or her responsive pleading in the trial court within the time prescribed by subdivision (b) unless, on or before the last day of the defendant's time to plead, he or she serves upon the adverse party and files with the trial court a notice that he or she has petitioned for a writ of mandate. The service

and filing of the notice shall extend the defendant's time to plead until 10 days after service upon him or her of a written notice of the final judgment in the mandate proceeding. The time to plead may for good cause shown be extended by the trial court for an additional period not exceeding 20 days.

(d) No default may be entered against the defendant before expiration of his or her time to plead, and no motion under this section, or under Section 473 or 473.5 when joined with a motion under this section, or application to the court or stipulation of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant.

§ 904.1. Superior courts; appealable judgments and orders

An appeal may be taken from a superior court in the following cases:

(a) From a judgment, except (1) an interlocutory judgment, other than as provided in subdivisions (h) and (i), (2) a judgment of contempt which is made final and conclusive by Section 1222, (3) a judgment on appeal from a municipal court or a justice court or a small claims court, or (4) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition, or a judgment or order for the payment of monetary sanctions, upon petition for an extraordinary writ.

(b) From an order made after a judgment made appealable by subdivision (a).

(c) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(d) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(e) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(f) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(g) From an order appointing a receiver.

(h) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.

(i) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.

(j) From an order made appealable by the provisions of the Probate Code or the Family Law Act, Part 5 (commencing with Section 4000).

(k) From a superior court judgment directing payment of monetary sanctions by a party or an attorney for a party only if the amount exceeds seven hundred fifty dollars ($750). Lesser sanction judgments against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ.